United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1853

B P/S

To be argued by
VINCENT L. LEIBELL, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

SHINKO BOEKI CO., LTD.,
Plaintiff-Appellant,

against

S.S. "PIONEER MOON", her engines, boilers, etc., and UNITED STATES LINES, INC.,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

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The Issue Presented for Review

Are 2,000-gallon movable tanks, belonging to the defendant ocean carrier and used to transport plaintiff's bulk shipment of liquid synthetic latex, packages within the meaning of The Carriage of Goods By Sea Act (COGSA), 46 U.S.C. 1304(5)?

Statement of the Case

This is an appeal by the plaintiff Shinko Boeki Co., Ltd. (hereinafter plaintiff) from so much of a final judgment (p. 15)* in an admiralty action in the Southern District of New York (Frankel, J.), which limits plaintiff's recovery to $500 for the contents of each movable, 2,000-gallon tank. It is plaintiff's contention that the damages should have been computed upon the basis of the customary freight unit used by the ocean carrier to calculate the freight for this bulk cargo of liquid synthetic latex.

The Facts

All of the facts pertaining to this controversy were either stipulated by the parties (Exhibits 1 and 2; pp. 17 through 23) or were contained in one deposition submitted to the trial court (Exhibit A; p. 24). No witnesses testified before Judge Frankel. The courtroom session on April 17, 1974 was over in about forty-five minutes.

While in court the defendant finally conceded liability (p. 13).

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* References are to pages in the Joint Appendix.

The S.S. "Pioneer Moon", owned and operated by defendant was engaged in the common carriage of go between Baltimore and Yokohama. Movable tanks, ow by the defendant, were made available to Firestone In national Company, acting as agent for the plaintiff (p. These tanks were 7′ 1″ in length, 7′ 9″ in width and 6 in height (p. 12). Each tank had a capacity of 2,000 lons (p. 12).

Firestone loaded twenty-four tanks with 359,170 lbs synthetic latex and received from the carrier two bills lading, of which only No. 18, dated December 13, 1968 (hibit B; p. 39), is relevant to this action. This cargo in sound condition when loaded in Baltimore (Exhibit p. 22). When the vessel arrived at Yokohama on Janu 14, 1969, eleven of the tanks were crushed, broken and le ing (Exhibit 1; pp. 17 through 21). The contents of tanks were completely lost and the contents of two ot tanks were either lost or so contaminated as to be unfit the intended purpose (p. 12; Exhibit 1; pp. 17 through

Despite the fact that the S.S. "Pioneer Moon" equipped with deep tanks for the movement of a bulk sh ment of liquid such as this, (p. 12) these movable tan owned by the vessel and carried back and forth on it, w the only type of operation made available to a shipper that time for the bulk shipment of latex to the Far E (Exhibit A; p. 38).

The bill of lading in question was printed by the defe ant and revised as of January, 1967, some 23 months pr to this shipment (Exhibit B; p. 39). In the lower l hand corner of this bill of lading, using its printed tomary freight unit—"per 2240 lbs"—the defendant culated the freight at $54.00 "per 2240 lbs" (a long t for a total of $8,658.56. In other words, the defend deliberately did not compute the freight based upon number of its 2,000-gallon tanks carried on the vessel. bill of lading is stamped "freight prepaid" (Exhibit p. 39).

POINT I

This case having been decided by the District Court upon stipulated facts and one deposition, which was marked as an exhibit, the "clearly erroneous rule" (Rule 52(a) F.R.C.P.) does not apply, for the Court of Appeals is in as good a position as the District Court to interpret the stipulations of fact and the deposition.

No witnesses appeared at the trial (p. 13). All of the facts were either stipulated (p. 13) or they are contained in one previously taken deposition of John B. Grimes (Exhibit A; p. 24).

In *Luckenbach S.S. Co.* v. *United States,* (2 Cir.) 157 F(2d) 250, 251, Judge Swan stated:

> "The appeal presents only questions of fact. All the evidence was by deposition. Hence this court is as well able as the trial judge to appraise the credibility of the witnesses and draw inferences from their testimony."

In *Dopp* v. *Franklin National Bank,* (2 Cir.) 461 F(2d) 873, 879, Judge Kaufman, writing for the majority, said:

> "This is not a case, however, where there was an evidentiary hearing below and the credibility of witnesses played an essential part in the district judge's determinations. We are in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and thus have broader discretion on review. See Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F(2d) 1315, 1317 (2d Cir. 1969)."

In *United States ex rel Lasky* v. *LaVallee,* (2 Cir.) 472 F(2d) 960, 963, Judge Waterman stated:

> "Customarily when this court reviews the factual findings of the lower court the 'clearly erroneous' rule

applies (Rule 52(a) Fed. R. Civ. P.), but in this case, where the factual findings of the district judge are made solely on the basis of an interpretation of documentary records, and the credibility of witnesses is not in issue, we may make our own independent factual determination. (Cases cited)."

POINT II

The two thousand gallon movable tanks owned by the defendant are "containers". Defendant has conceded this to be the fact. A container is not a package. It is a functional part of the ship. Therefore, the tanks are not packages to which the five hundred dollar limitation in COGSA can be applied.

Both parties are in agreement that these large metal tanks are containers. Plaintiff took that position in its trial brief and in court (pp. 8 and 9). The defendant flatly stated in its "Post Trial Brief", at page 21, that, "The tanks are obviously containers". It took the same position in Court (p. 7). The District Court Judge in his opinion called the tanks "containers" (p. 13).

Aside from the fact that the parties have agreed that the movable tanks, which are the subject of this litigation, are containers, there is a a treaty which defines a movable tank as a container.

The "Customs, Convention on Containers" ratified by the Senate on March 1, 1967 (Vol. 20, United States Treaties and Other International Agreements, p. 303, *et seq.*) states on page 304, that "the term 'container' shall mean an article of transport equipment (lift van, movable tank or other similar structure);" (Pertinent part reproduced in addendum to this brief, p. 16).

Since both by agreement of the parties to this litigation and treaty definition, movable tanks are containers, the

next question to be answered is—are containers packages within the meaning of COGSA, 46 U.S.C. 1304(5)? This court has answered that question in the negative in the landmark case of *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F(2d) 800, 815, when Chief Judge Friendly, held that a container was not a package but rather "* * * a large metal object, functionally a part of the ship * * *".

The similarity between the bill of lading issued for this shipment of liquid synthetic latex and the bill of lading in the *Leather's Best* case is striking. In our bill of lading (Exhibit B; p. 39) under columns headed "No. of Pkgs" and "Description of Packages and Goods", there is first listed the number and then a description as "Lift On Lift Off Tanks Synthetic Latex". This is followed, under appropriate headings, with the measurement figure of "7416" and the gross weight in pounds of "359,170". It should be noted that these two figures apply to the contents of all the tanks—the measurement and weight is not apportioned to the individual tanks. This is indicative that the parties knew that they were dealing with a bulk shipment of liquid. The witness, John B. Grimes, referred to this particular shipment as a bulk shipment (p. 38).

In the *"Mormaclynx"* bill of lading, under a column headed "Number and kind of packages; description of goods" there was entered the following language—"1 container S.T.C. 99 bales of leather" (451 F(2d) 800, 804). Immediately thereafter the gross weight was stated.

Plaintiff argues that, if a large metal container, owned by the vessel and requested by the shipper, was "functionally a part of the ship" in the *Mormaclynx* case then the large metal tanks (conceded to be containers), owned by the vessel and requested by the shipper, are functionally parts of the ship in our case.

Plaintiff sincerely hopes that the defendant in its answering brief will make an effort to answer this argument,

and not follow the policy it adopted in the District Court of never mentioning the *Mormaclynx* case in either of its two briefs.

The District Court Judge in his opinion flatly disagreed with the conclusion of this Court in the *Mormaclynx* case when he stated:

> "The court's conclusion is rested in part upon the parties' own description and treatment of the containers. It seems sound in fact and in legal conception to say these movable receptacles, requested by Firestone, were not 'functionally a part of the ship', *Leather's Best,* supra, 451 F(2d) at 815, even though they were defendant's property." (P. 13)

Actually, the parties involved—shipper and carrier—repeatedly, in the bill of lading (Exhibit B; p. 39) and in subsequent correspondence (Exhibits D, D-1, D-2, D-3; pp. 42 through 46) used "tanks" as the descriptive word. Therefore, if tanks are containers—and concededly they are—the parties were referring to functional parts of the ship (*Leather's Best, Inc.* v. *S.S. "Mormaclynx"*, 451 F(2d) 800, 815), and not packages. Certainly a shipper cannot be held to have prejudiced his case by using terminology (tanks), which concededly means "containers", which, in turn, have been held by this court not to be packages.

The District Court Judge in his opinion remarks that:

> "The loss was repeatedly described by plaintiff in terms of '11 tanks' damaged with resulting leakage of the latex". (p. 12)

We fail to understand why the plaintiff should not use such language without suffering from any adverse implications, if—as conceded—movable tanks are containers, and if—as held by this Court in the *Leather's Best* case, 451 F(2d) 800, 815—containers are not packages.

Despite the fact that the descriptive language used by the parties, and the treatment accorded the containers, in both the *Mormaclynx* case and our case are virtually identical, the District Court Judge, while stating that his "* * * conclusion is rested in part upon the parties' own descriptions and treatment of the containers" (p. 13), reached a conclusion directly opposed to the conclusion of this Court in *Mormaclynx,* when he held that the containers, holding the liquid synthetic latex, were "not 'functionally a part of the ship'." (p. 13).

POINT III

This Court in the *Kulmerland* case did not overrule its holding in the *Mormaclynx* case. Furthermore, the *Kulmerland* holding—based upon the feasibility of the internal packing—is completely inapplicable to a container shipment of liquid cargo.

Defendant in its Trial Memorandum, page 12, said, "We think the *Kulmerland* is dispositive of this case * * *". Apparently, the District Court Judge agreed, when he stated:

> "The 'functional economics test' of *Royal Typewriter Co.* v. *M.V. Kulmerland,* 483 F(2d) 645, 648-49 (2d Cir. 1973), if not mechanically applicable, seems to support the result herein". (p. 13)

To suggest that "Kulmerland" is "not mechanically applicable" is an understatement. *Kulmerland* involved a shipment of 350 cartons of adding machines loaded into a container. The sole description on the bill of lading read "1 Container said to contain Machinery". As Judge Oakes said, at page 646, this was "* * * without any reference to the number of cartons of adding machines or to the fact that the 'Machinery' consisted of adding machines". On the same page the Court noted that the adding machines

were packed "in single-wall corrugated cartons each approximately 15″ x 10″ x 10″ in dimension, 12¼ pounds in weight, and sealed with thin paper tape". Finally, at pages 648, 649, the Court held:

> "Here it is plain that they could not feasibly have been shipped in those individual cartons; adding machines are a delicate product—their little cardboard cartons, stapled and paper-taped, had never been shipped as such; in the days before containers they were shipped in wooden crates or cases containing 12 to 24 each. The metal containers in which the cartons were shipped in lots of 350 per container are essentially to be likened to the wooden crates or cases of days past; the use of the metal container of convenience to shipper and carrier alike was selected by the shipper and used without carrier objection".

Unlike *Kulmerland,* in our case the defendant knew everything about the cargo it was carrying. It knew from the bill of lading, which it had issued, the exact nature of the cargo; it knew the exact weight of the cargo; and it knew exactly how the cargo was placed in the tanks—it was poured in, just as any liquid cargo is poured into any tank, be it a movable tank or a deep tank.

Clearly the "functional economics test" of *Kulmerland,* dealing with the nature of interior packaging, could not possibly apply to a shipment of liquid, which by its very nature, at any time and at any place, has to be poured into something.

The leading case involving the application of the $500 limitation to customary freight units for bulk shipments of liquids is *The Bill,* 55 F.Supp. 780. Judge Chestnut, at page 783 said:

> "Upon consideration of this hitherto unadjudicated point, I conclude that the phrase 'per customary freight unit' in this context in the light of its legisla-

tive history, refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged."

In *Waterman S.S. Corp.* v. *United States S.R. & M. Co.*, 155 F(2d) 687, cert. den. 329 U.S. 761, the Court, at page 693, quoted with approval from *The Bill* (*supra*) in holding that 13 pieces of steel lost overboard should be valued at $500 per one hundred pounds, and not at $500 per piece of steel as demanded by the carrier, where the freight had been calculated by the hundred-weight.

In our case, defendant carrier on the face of its bill of lading, which set forth the total weight of the liquid contained in all the tanks (Exhibit B; p. 39) deliberately calculated the freight—which was prepaid—on the basis of $54.00 "per 2240 lbs." (a long ton) for a total of $8,658.56.

In charging freight upon a "customary freight unit" basis, the defendant used a bill of lading printed formula it had revised to its satisfaction in January 1967—some 23 months prior to this shipment (Exhibit B; p. 39). It thus used exactly the same formula it would have used had the liquid cargo been poured into the vessel's metal deep tanks rather than into the vessel's metal movable tanks.

Apparently, the defendant carrier believes that, despite the Carriage of Goods By Sea Act, 46 U.S.C. § 1303(8), it can lessen its liability, by requiring a shipper to pour its liquid cargo into the vessel's movable tanks rather than into its deep tanks. Plaintiff believes that there is no authority in law or in logic to support this theory.

Judge Anderson, in *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer,* 422 F(2d) 7, 15, noted that a bill of lading, "* * * drafted and issued by the carrier (and) constituted a contract of adhesion". Prior to that statement, Judge Anderson, at pages 11 to 13, described in detail how unfair results were caused when ocean car-

riers "* * * exercising their vastly superior bargaining powers, compelled shippers to submit to the insertion of innumerable, all embracing exceptions to liability in bills of lading which the carriers drafted" (p. 11).

As we shall see in the following "Point", this effort of the defendant carrier to limit its liability by making a distinction between its movable tanks and deep tanks, is not its only attempt to circumvent the provisions of the Carriage of Goods By Sea Act.

POINT IV

Defendant's effort to declare in its bill of lading and its tariff that a container is a package—thus limiting its liability to five hundred dollars per container—is invalid. Just such an effort has been declared invalid by this Court.

The District Court Judge in his opinion quoted the following from defendant's long-form bill of lading (Exhibit C; p. 40, par. 24) incorporated in the contract of carriage:

> "It is agreed and understood that the meaning of the word 'package' includes containers, vans trailers, palletized units, animals and all pieces, articles or things of any description whatsoever except goods shipped in bulk". (p. 12)

Leaving aside for the moment the exclusionary words "except goods shipped in bulk", the District Court Judge apparently was of the opinion that the paragraph had some legal significance—otherwise he would not have bothered to quote it. Possibly his reason for quoting it appears in his later statement that, "The court's conclusion is rested in part upon the parties' own descriptions and treatment of the containers" (p. 13).

This Court in *Leather's Best, Inc.* v. *S.S. "Mormaclynx"*, 451 F(2d) 800 made it crystal clear that an effort

by the carrier to provide by contract that a container is a package, is invalid. Chief Judge Friendly, at page 804, quoted from the objectionable provision, in that case, as follows:

> "SHIPPER HEREBY AGREES THAT CARRIER'S LIABILITY IS LIMITED TO $500 WITH RESPECT TO THE ENTIRE CONTENTS OF EACH CONTAINER EXCEPT WHEN SHIPPER DECLARES A HIGHER VALUATION AND SHALL HAVE PAID ADDITIONAL FREIGHT ON SUCH DECLARED VALUATION PURSUANT TO APPROPRIATE RULE IN THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE TARIFF."

At pages 815, 816, Chief Judge Friendly held the above quoted provision to be an invalid limitation of liability under COGSA.

Section 1304(5) of COGSA limits a carrier's liability to "* * * $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, * * *". Section 1303(8) of COGSA provides as follows:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, *or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.* A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." (emphasis ours)

Judge Anderson in *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer,* 422 F(2d) 7, 12, clearly described, in the following words, the reasons which prompted Congress to enact Section 1303(8) of COGSA:

> "In anticipation of persistent efforts by carriers, who are the drafters of ocean bills of lading, to limit

> or eliminate their own duties and responsibilities under the Act by inserting into the foot long, double columns of well nigh indecipherable fine print, various exceptions to their possible liabilities, COGSA included a self-protective provision, § 1303(8), which prohibited the inclusion of clauses which relieve the carrier or ship from liability for loss or damage to goods arising from negligence, fault or failure in fulfilling obligations specified in other portions of the section or lessening such liabilities."

When an ocean carrier attempts to provide in its own bill of lading or tariff that the contents of a container shall be limited in value to $500 in case of a loss, it is not only "lessening such liability otherwise than as provided in this Act", but it is trying to usurp the function of the Court to determine whether or not, under law, a container is a package.

If a container is held to be a package by a court of competent jurisdiction, so be it. If a container is held by a court of competent jurisdiction not to be a package, as it was in *Mormaclynx,* 451 F(2d) 800, 815, then a carrier in a contract of adhesion (*Hong Kong Producer,* 422 F(2d) 7, 15, cert. den. 397 U.S. 964) cannot require a shipper to agree that, contrary to law, a container is a package. If a carrier could legally do such a thing section 1303(8) of COGSA would be meaningless.

* * * * *

At page 10 of this brief we left aside for the moment the exclusionary words "except goods shipped in bulk", which appear in the carrier's invalid provision in its long-form bill of lading, as quoted by the District Court Judge in his opinion (p. 12).

Plaintiff's liquid synthetic latex was shipped "in bulk". The short-form bill of lading (Exhibit B; p. 39) set forth

one figure—359,170 lbs.—as the gross weight for all of the liquid synthetic latex in all of the tanks. The witness, John B. Grimes when asked the following question gave the indicated answer:

> "Q. Do you have any knowledge as to why this shipment moved in the type of tanks that it did? A. To the Far East at that time, that was the only type of operation available for bulk shipment of latex." (p. 38)

This being a bulk shipment, even by the terms and conditions of the carrier's invalid provision quoted by the District Court Judge (p. 12), this shipment was excluded from its attempted application.

POINT V

It is not a valid argument to state that there would be no problem if a shipper would declare a higher value and pay a higher tariff. For if a container is not a package, there is no reason for a shipper to declare a higher value and pay a higher tariff. To hold that a shipper must do so only begs the question of what is a "package".

It is also improper to consider whether a particular shipper is insured or not. Most are. Some are not. In any event, there is only one law equally applicable to insured and uninsured shippers.

Judge Oakes in his *Kulmerland* opinion, 483 F(2d) 645, 648 had this to say about the argument that a shipper has an option to obtain "marine insurance coverage, if he prefers the cheaper freight rates of larger packages":

> "But we think this approach tends to beg the statutory question of what is a 'package'."

Judge Feinberg in his dissenting opinion in *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische, etc.,* 375 F(2d) 943, 948, said:

> "Third, the majority implies that this shipper could have obtained full coverage by declaring the nature and value of goods and, if necessary, paying a higher tariff. But if each carton was a package, there would be no occasion for a special declaration at a higher charge, since each carton was worth less than $500. Thus, finding significance in failure to declare merely begs the question of how to construe the word 'package'."

Indeed, it seems both logical and fair to conclude that if a container is not a package, there is no reason why a shipper should make a special declaration and pay a higher charge.

The District Court Judge in his opinion concluded that the issue "* * * could be avoided in substantially every case by the shipper's decision to state and pay for the protection he desires" (p. 11).

For the reasons given by Judges Oakes and Feinberg (pgs. 13, 14 of this brief) we think the position taken by the District Court Judge is more than erroneous—it is indefensible. It it was defensible, it would be just as logical for a Court to take the position in a tax case, that the litigation could be avoided if only the taxpayer would pay the amount demanded by the taxing authority.

* * * * * *

The District Court Judge in the first sentence of his opinion seems to express displeasure over being called upon to decide between "* * * contending insurers at war over 'what constitutes a "package" within § 4(5) of COGSA, 46 U.S.C. § 1304(5)' * * *" (p. 11). We do not agree with his view. While it is certainly true that most overseas shipments are insured, it is just as true that not all are

insured. There is, and can be, only one law for all shippers, insured and uninsured. A decision involving "contending insurers" can control a subsequent controversy involving an uninsured shipper.

It has long been recognized that an insurance underwriter, who pays a cargo owner for a loss, may sue in the name of the cargo owner. *United States* v. *American Tobacco Co.*, 166 U.S. 468, 474. Inherent in such a rule of law is a belief that the insurance underwriter is entitled to assume the same position in litigation as the cargo owner —for better or for worse.

CONCLUSION

The judgment of the District Court limiting plaintiff's damages to $500 per tank (container) should be reversed and judgment directed for the plaintiff upon the stipulated freight unit basis in the amount of $27,733.73 (p. 6).

Respectfully submitted,

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ADDENDUM

U.S. Treaties and Other International Agreements

CUSTOMS CONVENTION ON CONTAINERS

PREAMBLE

The Contracting Parties,

Desiring to develop and to facilitate the use of containers in international traffic,

Have agreed as follows:

CHAPTER I

DEFINITIONS

Article 1

For the purpose of this Convention:

(*a*) The term "import duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation;

(*b*) The term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure):

(i) Of a permanent character and accordingly strong enough to be suitable for repeated use;

(ii) Specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;

(iii) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;

(iv) So designed as to be easy to fill and empty; and

Addendum.

(v) Having an internal volume of one cubic metre or more;

and shall include the normal accessories and equipment of the container, when imported with the container; the term "container" includes neither vehicles nor conventional packing;

(*c*) The term "persons" shall mean both natural and legal persons unless the context otherwise requires.

CHAPTER II

TEMPORARY IMPORTATION FREE OF IMPORT DUTIES AND IMPORT TAXES AND FREE OF IMPORT PROHIBITIONS AND RESTRICTIONS

Article 2

Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded to be re-exported either empty or loaded, or imported empty to be re-exported loaded. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention.

Article 3

Containers temporarily imported free of import duties and import taxes shall be re-exported within three months from the date of importation. This period may be extended for

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